

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

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|------------------------------|---|-----------------------------|
| ADELL DEMARAIS, on behalf of |) | |
| V.A.D., a minor child, |) | No. CV-05-0025-MWL |
| |) | |
| Plaintiff, |) | ORDER GRANTING PLAINTIFF'S |
| |) | MOTION FOR SUMMARY JUDGMENT |
| v. |) | |
| |) | |
| JO ANNE B. BARNHART, |) | |
| Commissioner of Social |) | |
| Security, |) | |
| |) | |
| Defendant. |) | |

BEFORE THE COURT are cross-Motions for Summary Judgment, noted for hearing without oral argument on November 7, 2005. (Ct. Rec. 12, 17). Adell Demarais ("Mrs. Demarais"), on behalf of her minor daughter, V.A.D. ("Plaintiff"), did not file a reply. Attorney Lora Lee Stover represents Plaintiff; Special Assistant United States Attorney Leisa A. Wolf represents the Commissioner of Social Security ("Commissioner"). The parties have consented to proceed before a magistrate judge. (Ct. Rec. 7). After reviewing the administrative record and the briefs filed by the parties, the Court **GRANTS** Plaintiff's Motion for Summary Judgment (Ct. Rec. 17), **DENIES** Defendant's Motion for Summary Judgment (Ct. Rec. 12), and **REMANDS** the case for further proceedings.

JURISDICTION

On November 25, 2002, Plaintiff filed an application for Supplemental Security Income ("SSI") benefits, alleging disability since September 15, 2002, due to a learning disability. (Administrative Record ("AR") 49-52, 102). The application was denied initially and on reconsideration. On August 11, 2004, Plaintiff appeared before Administrative Law Judge ("ALJ") Richard Hines, at which time testimony was taken from Plaintiff and Plaintiff's mother, Mrs. Demarais. (AR 297-321). On September 8, 2004, the ALJ issued a decision finding that Plaintiff was not disabled. (AR 19-25). The Appeals Council denied a request for review on December 29, 2004. (AR 5-8). Therefore, the ALJ's decision became the final decision of the Commissioner, which is appealable to the district court pursuant to 42 U.S.C. § 405(g). On February 1, 2005, Plaintiff filed this action for judicial review pursuant to 42 U.S.C. § 405(g). (Ct. Rec. 1).

STATEMENT OF FACTS

The facts have been presented in the administrative hearing transcript, the ALJ's decision, the briefs of both Plaintiff and the Commissioner and will only be summarized here. Plaintiff was 14 years old on the date of the ALJ's decision. (25, 49). At the administrative hearing held on August 11, 2004, Plaintiff testified that she lived with her mother and father and was attending special education classes at a middle school in Spokane, Washington. (AR 302, 304). Plaintiff stated that she was going to be attending special education classes at the high school level this coming school year. (AR 304-305). She indicated that she had a few friends she spent time with outside of school and played

1 video games at home for fun. (AR 305-306). Plaintiff testified
2 that she did not participate in extra-curricular activities, did
3 not belong to any clubs and did not attend any courses outside of
4 school. (AR 305, 307).

5 At the administrative hearing held on August 11, 2004, Mrs.
6 Demarais testified that her household consisted of herself, her
7 husband and Plaintiff, and their source of income came from SSI
8 benefits both her and her husband received and from a state
9 adoption check for Plaintiff. (AR 308). Mrs. Demarais stated
10 that she believed Plaintiff was disabled because "her teacher . .
11 . said that . . . I should try to get SSI for her because she's
12 got a learning disability." (AR 310). Mrs. Demarais stated that
13 Plaintiff is going into the ninth grade yet she is only doing
14 third and fourth grade work at school. (AR 310).

15 Mrs. Demarais testified that Plaintiff gets along with other
16 children, gets along with her and her husband, is not a discipline
17 problem at school, and does not have any particular problems with
18 individual teachers. (AR 311-312). Mrs. Demarais stated that
19 Plaintiff likes school, does not like to miss even one day of
20 school, and did not miss much school. (AR 311-312). Mrs.
21 Demarais indicated that Plaintiff likes to play basketball and
22 baseball, hit a punching bag, and ride her bicycle and scooter.
23 (AR 312). She stated that Plaintiff had never been treated
24 outside of the school setting for any emotional problems by a
25 counselor, psychiatrist or psychologist. (AR 312).

26 Mrs. Demarais testified that she "kind of" considered
27 Plaintiff to be an average 14 year old, and that Plaintiff plays
28 with other children about her same age. (AR 314-315). She stated

1 that Plaintiff does not have any difficulties dressing herself,
2 using the bathroom, or doing her hair. (AR 315). Mrs. Demarais
3 indicated that Plaintiff is able to tell time, count change and
4 could look up numbers in a phone book. (AR 316-317).

5 At the end of the hearing, Plaintiff's counsel argued that it
6 would be appropriate for the file to be reviewed by a licensed
7 psychologist, or for another consultative exam to be completed,
8 given the teacher's comments that Plaintiff has a very serious
9 problem as far as comprehending oral instructions, understanding
10 school and content vocabulary, reading and comprehending written
11 material, et cetera. (AR 319-320). No medical expert was called
12 upon to give testimony at the administrative hearing.

13 SEQUENTIAL EVALUATION PROCESS

14 On August 22, 1996, Congress passed the Personal
15 Responsibility and Work Opportunity Reconciliation Act of 1996,
16 Pub. L. 104-193, 110 Stat. 105 which amended 42 U.S.C. §
17 1382c(a)(3). Under this law, a child under the age of eighteen is
18 considered disabled for the purposes of SSI benefits if "that
19 individual has a medically determinable physical or mental
20 impairment, which results in marked and severe functional
21 limitations, and which can be expected to result in death or which
22 has lasted or can be expected to last for a continuous period of
23 not less than 12 months." 42 U.S.C. § 1382c(a)(3)(C)(i) (2003).

24 The regulations provide a three-step process in determining
25 whether a child is disabled. First, the ALJ must determine
26 whether the child is engaged in substantial gainful activity. 20
27 C.F.R. § 416.924(b). If the child is not engaged in substantial
28 gainful activity, then the analysis proceeds to step two. Step

1 two requires the ALJ to determine whether the child's impairment
2 or combination of impairments is severe. 20 C.F.R. § 416.924(c).
3 The child will not be found to have a severe impairment if it
4 constitutes a "slight abnormality or combination of slight
5 abnormalities that causes no more than minimal functional
6 limitations." *Id.* If, however, there is a finding of severe
7 impairment, the analysis proceeds to the final step which requires
8 the ALJ to determine whether the impairment or combination of
9 impairments "meet, medically equal or functionally equal" the
10 severity of a set of criteria for an impairment in the listings.
11 20 C.F.R. § 416.924(d).

12 The regulations provide that an impairment will be found to
13 be functionally equivalent to a listed impairment if it results in
14 extreme limitations in one area of functioning or marked
15 limitations in two areas. 20 C.F.R. § 416.926a(a). To determine
16 functional equivalence, the following six domains, or broad areas
17 of functioning, are utilized: acquiring and using information,
18 attending and completing tasks, interacting and relating with
19 others, moving about and manipulating objects, caring for yourself
20 and health and physical well-being. 20 C.F.R. § 416.926a.

21 STANDARD OF REVIEW

22 Congress has provided a limited scope of judicial review of a
23 Commissioner's decision. 42 U.S.C. § 405(g). A court must uphold
24 the Commissioner's decision, made through an ALJ, when the
25 determination is not based on legal error and is supported by
26 substantial evidence. *See Jones v. Heckler*, 760 F.2d 993, 995
27 (9th Cir. 1985); *Tackett v. Apfel*, 180 F.3d 1094, 1097 (9th Cir.
28 1999). "The [Commissioner's] determination that a plaintiff is

1 not disabled will be upheld if the findings of fact are supported
2 by substantial evidence." *Delgado v. Heckler*, 722 F.2d 570, 572
3 (9th Cir. 1983) (*citing* 42 U.S.C. § 405(g)). Substantial evidence
4 is more than a mere scintilla, *Sorenson v. Weinberger*, 514 F.2d
5 1112, 1119 n.10 (9th Cir. 1975), but less than a preponderance.
6 *McAllister v. Sullivan*, 888 F.2d 599, 601-602 (9th Cir. 1989);
7 *Desrosiers v. Secretary of Health and Human Services*, 846 F.2d
8 573, 576 (9th Cir. 1988). Substantial evidence "means such
9 evidence as a reasonable mind might accept as adequate to support
10 a conclusion." *Richardson v. Perales*, 402 U.S. 389, 401 (1971)
11 (citations omitted). "[S]uch inferences and conclusions as the
12 [Commissioner] may reasonably draw from the evidence" will also be
13 upheld. *Mark v. Celebrezze*, 348 F.2d 289, 293 (9th Cir. 1965).
14 On review, the court considers the record as a whole, not just the
15 evidence supporting the decision of the Commissioner. *Weetman v.*
16 *Sullivan*, 877 F.2d 20, 22 (9th Cir. 1989) (*quoting Kornock v.*
17 *Harris*, 648 F.2d 525, 526 (9th Cir. 1980)).

18 It is the role of the trier of fact, not this court, to
19 resolve conflicts in evidence. *Richardson*, 402 U.S. at 400. If
20 evidence supports more than one rational interpretation, the court
21 may not substitute its judgment for that of the Commissioner.
22 *Tackett*, 180 F.3d at 1097; *Allen v. Heckler*, 749 F.2d 577, 579
23 (9th Cir. 1984). Nevertheless, a decision supported by
24 substantial evidence will still be set aside if the proper legal
25 standards were not applied in weighing the evidence and making the
26 decision. *Browner v. Secretary of Health and Human Services*, 839
27 F.2d 432, 433 (9th Cir. 1987). Thus, if there is substantial
28 evidence to support the administrative findings, or if there is

1 conflicting evidence that will support a finding of either
2 disability or nondisability, the finding of the Commissioner is
3 conclusive. *Sprague v. Bowen*, 812 F.2d 1226, 1229-1230 (9th Cir.
4 1987).

5 **ALJ'S FINDINGS**

6 The ALJ found at step one that Plaintiff has never engaged in
7 substantial gainful activity. (AR 20). At steps two, the ALJ
8 determined that Plaintiff suffers from the following severe
9 impairments: asthma, borderline intellectual functioning and a
10 learning disorder. (AR 22). The ALJ determined that the evidence
11 of record demonstrated that Plaintiff's impairments, although
12 severe, do not meet, medically equal, or functionally equal the
13 criteria of any of the listings impairments. (AR 22, 25).

14 With regard to functional equivalence, the ALJ made the
15 following findings: Plaintiff has less than marked limitations in
16 acquiring and using information, Plaintiff has less than marked
17 limitations in attending and completing tasks, Plaintiff has no
18 limitation in interacting and relating with others, Plaintiff's
19 ability to move about and manipulate objects is unimpaired,
20 Plaintiff has no limitation to a less than marked limitation in
21 her ability to care for herself, and Plaintiff has a less than
22 marked limitation in health and physical well being. (AR 23-24).
23 The ALJ thus determined that Plaintiff's impairments did not
24 result in any marked or extreme limitations in any of the assessed
25 domains. (AR 24). Accordingly, the ALJ concluded Plaintiff was
26 not under a disability within the meaning of the Social Security
27 Act. (AR 24-25).

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ISSUES

Plaintiff contends that the Commissioner erred as a matter of law. Specifically, she argues that:

1. The ALJ failed to fully and fairly develop the record with regard to Plaintiff's psychological impairments;

2. The ALJ erred by failing to elicit testimony from a medical advisor/psychologist to address the listings as well as the domains of functioning;

3. The ALJ erred by failing to adequately address the severity of Plaintiff's impairments, individually, as well as in combination; and

4. The ALJ's decision is legally insufficient upon which to deny benefits to Plaintiff.

This court must uphold the Commissioner's determination that Plaintiff is not disabled if the Commissioner applied the proper legal standards and there is substantial evidence in the record as a whole to support the decision.

DISCUSSION

Plaintiff argues that the ALJ failed in his duty to fully and fairly develop the record in this case. (Ct. Rec. 13, pp. 10-11). Plaintiff specifically contends that the ALJ failed to adequately assess the severity of Plaintiff's impairments by refusing to order an additional consultative psychological evaluation or to utilize a medical advisor in order to determine the nature and extent of Plaintiff's psychological impairments. (Ct. Rec. 13, p. 11).

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1 The ALJ has a duty to fully and fairly develop the record.
2 *Brown v. Heckler*, 713 F.2d 441, 443 (9th Cir. 1983). However, the
3 Ninth Circuit places on Plaintiff the burden of proving prejudice
4 or unfairness as a result of an ALJ's failure to develop the
5 record fully. *Vidal v. Harris*, 637 F.2d 710, 713 (9th Cir. 1991)
6 (If a Plaintiff can demonstrate prejudice or unfairness as a
7 result of the ALJ's failure to fully and fairly develop the
8 record, the decision may be set aside).

9 The undersigned notes at the outset that the medical evidence
10 in this case was quite minimal. Therefore, an updated
11 consultative examination or medical expert testimony regarding
12 Plaintiff's impairments and limitations might very well have been
13 beneficial to the ALJ in this case. In any event, as aptly
14 pointed out by Plaintiff, *Howard ex rel. Wolff v. Barnhart*, 341
15 F.3d 1006 (9th Cir. 2003), requires an ALJ to rely on a case
16 evaluation from a pediatrician or other appropriate specialist,
17 based on the record in its entirety, rather than simply
18 constructing his own case evaluation from the record. In *Wolff*,
19 the Ninth Circuit determined that the ALJ in a child disability
20 case erred by relying on individual evaluations and reports of
21 separate specialists, rather than relying on a specialist
22 evaluating the case as a whole. *Wolff*, 341 F.3d at 1014. The
23 Court held that 42 U.S.C. § 1382c(a)(3)(I) directs that, before
24 making a determination whether a child is disabled within the
25 meaning of the Social Security Act, an ALJ must obtain a case
26 evaluation by a qualified medical professional who considers all
27 of the relevant evidence of record. *Id.*

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1 In the case at hand, Joyce Everhart, Ph.D., completed an
2 evaluation of Plaintiff on April 15, 2003, on behalf of the
3 Division of Disability Determination Services. (AR 243-247). Dr.
4 Everhart indicated that medical records were not available for
5 review, but she did have available for review an October 1, 1999
6 school psychological examination, September 29, 1999 results of
7 the Woodcock-Johnson Psycho-Educational Battery-Revised, and
8 December 2002 and January 2003 Teacher Questionnaires. (AR 243).

9 Dr. Everhart determined that student records revealed no
10 evidence of any health/physical problems that might interfere with
11 her educational achievement. (AR 243). It was noted that
12 Plaintiff's personal grooming, which she takes care of herself,
13 was very good. (AR 244). Results of the Wechsler Intelligence
14 Scale for Children III indicated borderline intellectual
15 functioning. (AR 245).

16 Dr. Everhart diagnosed Plaintiff with a Reading Disorder,
17 Borderline Intellectual Functioning and Educational Problems and
18 gave Plaintiff a Global Assessment of Functioning ("GAF") score of
19 65.¹ She noted that Plaintiff's reading level is lower than
20 expected given her intellectual functioning and does not indicate
21 any significant gains for the past several years. (AR 246). Dr.
22 Everhart found Plaintiff related well and was cooperative with
23 adults as well as with friends her age, her behavior appeared to
24 be appropriate, her concentration and persistence appeared to be
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27 ¹A GAF of 70-61 is characterized as: "Some mild symptoms or some
28 difficulty in social, occupational, or school functioning, but generally
functioning pretty well." DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 12
(3d ed. Rev. 1987).

1 in line with her intellectual functioning and her pace was
2 adequate. (AR 247).

3 However, Dr. Everhart did not review the detailed May 28,
4 2003 teacher questionnaire completed by Plaintiff's 7th grade
5 special education teacher, Sarah Davis. (AR 135-142). Ms. Davis
6 reported that Plaintiff had very little academic growth during the
7 school year, gaining only three months in reading, zero months in
8 writing, and six months in math. (AR 142).

9 Ms. Davis indicated that, in the area of acquiring and using
10 information, Plaintiff had a great deal of difficulty remembering
11 "what was taught the previous day," and she needed "continuous
12 repetition - direct instruction." (AR 136). She noted that
13 Plaintiff's reasoning and problem solving skills were very low,
14 she has difficulty remembering instructions that are more than one
15 step, and she appears to be very dyslexic as she still reverses
16 her letters and numbers and her writing was illegible. (AR 136).
17 It was noted that Plaintiff had a "very serious problem" in nine
18 of the 10 areas of functioning set forth in this domain. (AR
19 136). In the area of attending and completing tasks, Ms. Davis
20 indicated that Plaintiff forgets to do her homework, loses papers,
21 and has to sit next to the teacher when working in class because
22 Plaintiff has difficulty following along. (AR 137). It was noted
23 that Plaintiff has a "very serious problem" with carrying out
24 multi-step instructions, completing assignments, completing work
25 accurately without careless mistakes and working at a reasonable
26 pace/finishing on time. (AR 137). No problems were reported in
27 the areas of interacting and relating with others, moving about
28 and manipulating objects, and caring for herself. (AR 138-140).

1 The May 28, 2003 teacher questionnaire completed by
2 Plaintiff's 7th grade special education teacher provides a
3 detailed view of Plaintiff's limitations in the classroom. (AR
4 135-142). This report, in conjunction with all other evidence of
5 record, should have been evaluated by a qualified pediatrician or
6 other individual who specializes in a field appropriate to the
7 alleged disability of Plaintiff. *Wolff*, 341 F.3d at 1014; 42
8 U.S.C. § 1382c(a)(3)(I). However, neither Dr. Everhart, nor any
9 other medical professional of record evaluated Plaintiff's case in
10 its entirety; taking into consideration the May 28, 2003
11 questionnaire in addition to all other evidence of record.
12 Although it appears that the ALJ considered all the record
13 evidence when formulating his disability determination, as in the
14 *Wolff* case, it is clear that at no point did the ALJ have
15 Plaintiff's case evaluated as a whole by a trained medical
16 professional.

17 Based on the foregoing, the ALJ committed legal error by not
18 complying with the mandate of 42 U.S.C. § 1382c(a)(3)(I), as
19 interpreted by the Ninth Circuit in *Howard ex rel. Wolff v.*
20 *Barnhart*, 341 F.3d at 1006. Further inquiry regarding Plaintiff's
21 condition is required. Accordingly, a remand is necessary for
22 further proceedings so that the record may be fully developed with
23 regard to Plaintiff's impairments and limitations.

24 CONCLUSION

25 Plaintiff argues that the ALJ's errors should result in this
26 Court reversing the ALJ's decision and awarding benefits. (Ct.
27 Rec. 13). The Court has the discretion to remand the case for
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1 additional evidence and finding or to award benefits. *Smolen v.*
2 *Chater*, 80 F.3d 1273, 1292 (9th Cir. 1996). The Court may award
3 benefits if the record is fully developed and further
4 administrative proceedings would serve no useful purpose. *Id.*
5 Remand is appropriate when additional administrative proceedings
6 could remedy defects. *Rodriguez v. Bowen*, 876 F.2d 759, 763 (9th
7 Cir. 1989). In this case, further development is necessary to
8 remedy defects and for a proper determination to be made.

9 On remand, the ALJ shall fully and fairly develop the record
10 with regard to Plaintiff's mental impairments and limitations by
11 procuring additional medical consultant information and by
12 eliciting medical expert testimony at a new administrative
13 hearing. The medical professionals shall evaluate Plaintiff's
14 case in its entirety, taking into consideration the May 28, 2003
15 teacher questionnaire (AR 135-142) in addition to all other
16 relevant evidence of record. The medical professionals shall
17 address the Listings, in particular Listing 112.05, as well as the
18 six domains of functioning. In addition to her psychological
19 limitations, the record reflects that Plaintiff also suffers from
20 asthma. Therefore, on remand, the ALJ shall additionally reassess
21 Plaintiff's physical restrictions as a result of her asthma and
22 address the limitations caused by all of her impairments,
23 individually, and in combination. The ALJ shall also take into
24 consideration any other evidence or testimony relevant to
25 Plaintiff's disability claim. Accordingly,

26 **IT IS ORDERED:**

27 1. Plaintiff's Motion for Summary Judgment (Ct. Rec. 12) is
28 **GRANTED** in part and the above captioned matter is **REMANDED** for

1 additional proceedings as outlined above and pursuant to sentence
2 four of 42 U.S.C. § 405(g).

3 2. Defendant's Motion for Summary Judgment (Ct. Rec. 17) is
4 **DENIED.**

5 3. Judgment shall be entered for **PLAINTIFF**. An application
6 for attorney fees may be filed by separate motion.

7 4. The District Court Executive is directed to enter this
8 Order, provide a copy to counsel for Plaintiff and Defendant, and
9 **CLOSE** the file.

10 **DATED** this 9th day of December, 2005.

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12 s/Michael W. Leavitt
13 MICHAEL W. LEAVITT
14 UNITED STATES MAGISTRATE JUDGE
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